SMALL MEDIUM ENTERPRISE DEVELOPMENT BANK MALAYSIA BHD v. PEKAN LEGASI SDN BHD & ORS

HIGH COURT MALAYA, KUALA LUMPUR
AZLAN SULAIMAN JC
[SUIT NO: WA-22M-1051-12-2019]
25 APRIL 2022

Abstract – *A liquidator, as a creature of statute, derives his power from the statute and can only exercise the powers expressly provided under the statute. Pursuant to s. 486(1)(a), 486(2) and the Twelfth Schedule of the Companies Act 2016, the general powers of the liquidator must be exercised personally. There is no provision allowing the liquidator power to delegate or abrogate the exercise of any of his powers or to sanction another to exercise his powers.*

COMPANY LAW: *Winding up – Locus standi – Wound up company lodged joint appeal with directors – Whether company has locus standi to file notice of appeal – Whether only appointed liquidator has power and authority to institute and defend legal action for company*

COMPANY LAW: *Liquidators – Powers of – Power to delegate or abrogate exercise of liquidator's powers – Joint-appeal by wound up company – Whether liquidator has power to authorise director of company to bring appeal for wound up company – Whether only liquidator could exercise powers to 'bring or defend any action or other legal proceedings in the name and on behalf of the company' – Whether liquidator could provide sanction to creditor or contributory to bring action on behalf of wound up company – Whether 'sanction' could be ordered to have retrospective effect – Companies Act 2016, s. 486(2), items (a), (j), (k), Twelfth Schedule*

The plaintiff sought to recover the outstanding amounts under loan facilities it had granted to the first defendant, which the second and third defendants had jointly and severally guaranteed repayment of. On 9 January 2020, the plaintiff obtained a judgment-in-default of appearance ('JID') against all the defendants for the sums claimed. Over a year later, the defendants jointly applied to set aside the JID, which was dismissed on 15 April 2021 ('Registrar's decision'). Against this decision, on 28 April 2021, the defendants jointly appealed pursuant to O. 56 r. 1 of the Rules of Court 2012. Complication arose when, in between the Registrar's decision and the defendants' joint appeal, the first defendant was ordered to be wound up on the plaintiff's petition and the official receiver ('OR') was appointed as the liquidator of the first defendant. By a letter dated 17 February 2022, on the second defendant's application as a contributory of the first defendant, the liquidator granted a 'sanction' to the second defendant to commence and proceed with the action and to appoint Messrs Justin Faye & Partners

('Messrs Justin') to represent the first defendant. The plaintiff, by encl. 27 applied to strike out the defendants' appeal on the grounds that the first defendant was wound up at the time the appeal was lodged and therefore had no *locus standi* to lodge the appeal with the second and third defendants. On the other hand, the first defendant, *vide* encl. 29, sought an order that the sanction in the liquidator's letter of 17 February 2022 be given retrospective effect so as to validate the first defendant's appeal. The issues for the court's determination in these applications by the plaintiff and the defendant were: (i) whether the first defendant had the *locus standi* to appeal against the Registrar's decision; (ii) whether the sanction issued by the liquidator to the second defendant to proceed into the first defendant's appeal against the Registrar's decision was valid; (iii) whether the 'sanction' issued by the liquidator should have retrospective effect; and (iv) if the first defendant's appeal against the Registrar's decision was invalid, whether the second and third defendants' appeals *vide* the joint-appeal were also rendered invalid.

Held (dismissing first defendant's application in encl. 29 with costs; allowing plaintiff's application in encl. 27 in part with costs):

(1) Once a company has been wound up, only the appointed liquidator has the power and authority to institute and defend any legal action for the company. As only the liquidator could have lodged an appeal against the Registrar's decision for and on behalf of the first defendant after it was ordered wound up, the first defendant, on its own, did not have *locus standi* to appeal against the Registrar's decision at the time the defendants' joint-appeal was lodged. (paras 12 & 15)

(2) Neither the Companies Act 2016 ('CA') nor the Companies Act 1965 contain any express provisions giving a liquidator the power to delegate or abrogate the exercise of any of his powers, or the power to issue a sanction to someone else to exercise any of those powers. Parliament had intended for the liquidator to personally exercise those powers, including the power to 'bring or defend any action or other legal proceedings in the name and on behalf of the company' under item (a) of Part I of the Twelfth Schedule of the CA. Hence, a liquidator could not delegate any of his powers, including the power to 'bring or defend any action or other legal proceedings in the name and on behalf of the company'. (paras 30 & 35)

(3) The liquidator's letter was clearly not an appointment of the second defendant as his agent under item (j) of Part I of the Twelfth Schedule 'to do any business which the liquidator is unable to do'. The liquidator had, in effect and substance, abrogated and delegated his power under item (a) of Part I of the Twelfth Schedule to bring the first defendant's appeal against the Registrar's decision to the second defendant as a contributory of the first defendant. The 'kebenaran penyelesai' in the

liquidator's letter was two-fold: (i) to give sanction to the second defendant to continue with the first defendant's appeal (subject to condition); and (ii) for him to appoint Messrs Justin for that purpose. Even though item (k) of the Twelfth Schedule of the CA allows a liquidator to 'appoint an advocate to assist him in his duties', it would not extend to appointing an advocate to assist a contributory to carry out a liquidator's duties. (paras 36, 39, 43 & 44)

(4) The CA does provide for giving a sanction to a creditor or contributory – and only a creditor and contributory – to bring an action on behalf of a wound up company. The power to issue such sanction is only exercisable by the court. As the power to lodge and continue with the first defendant's appeal against the Registrar's decision was given solely to the liquidator under s. 486 and item (a) of the Twelfth Schedule of the CA and there are no provisions in the CA for him to delegate the power, the 'sanction' which the liquidator purported to issue to the second defendant was not valid. Nor was the first defendant's application treated as an application under s. 486(2) of the CA. It followed that the first defendant had not obtained a valid sanction to appeal against the Registrar's decision. (paras 45 & 62-64)

(5) The 'sanction' issued by the liquidator on 17 February 2022 in the liquidator's letter should not be ordered to have retrospective effect as: (i) the liquidator had stated in the letter, *inter alia*, that the sanction was to take effect from the date of the letter; (ii) even though the courts have the power to grant leave with retrospective effect, *ie*, *leave nunc pro tunc*, it was only in appropriate circumstances which must be proven and in rare circumstances. Here, there were only bare allegations without documents or evidence and the gap of seven months between the defendants' joint-appeal and the application to the liquidator for sanction was not explained. (paras 76, 77, 80, 83 & 86)

(6) The plaintiff had not included any submissions on the issue as to whether the whole of the notice of appeal, including the second and third defendants' appeal against the Registrar's decision, was also vitiated by the invalidity of the first defendant's appeal. There were also no reasons why the second and third defendants' appeal should be so affected. Tainting them with the first defendant's invalid appeal would be unjust. (para 89)

Case(s) referred to:

Ah Toy v. Registrar of Companies (NT) 72 ALR 107 ***(refd)***

Cape Breton Company v. Fenn [1881] 17 Ch D 198 ***(dist)***

Goh Siew Koon & Ors v. Lim Jit Kim & Ors [2015] 1 LNS 1222 CA ***(refd)***

Hup Lee Coachbuilders Holdings Sdn Bhd v. Cycle & Carriage Bintang Bhd [2012] 10 CLJ 88 CA ***(refd)***

Kosmopolitan Credit & Leasing Sdn Bhd v. Yeo Heng Heang & Ors [1999] 1 LNS 103 HC ***(refd)***

Lai King Lung & Anor v. Merais Sdn Bhd [2020] 9 CLJ 449 FC ***(dist)***
Merais Sdn Bhd v. Lai King Lung & Anor [2019] 7 CLJ 1 CA ***(dist)***
Ooi Woon Chee & Anor v. Dato' See Teow Chuan & Ors And Other Appeals [2012] 2 CLJ 501 FC ***(refd)***
Reebok (M) Sdn Bhd v. CIMB Bank Bhd [2019] 9 CLJ 230 CA ***(dist)***
Russel v. Westpac Banking 13 ACSR 5 ***(dist)***
Small Medium Enterprise Development Bank Malaysia Bhd v. Blackrock Corporation Sdn Bhd & Ors [2017] 9 CLJ 45 CA ***(refd)***
University Of Malaya (University Malaya Medical Centre) v. FBSM CTECH Sdn Bhd [2018] 8 CLJ 71 CA ***(refd)***
Winstech Engineering Sdn Bhd v. ESPL (M) Sdn Bhd [2014] 2 CLJ 1 FC ***(refd)***
Zaitun Marketing Sdn Bhd v. Boustead Eldred Sdn Bhd [2010] 3 CLJ 785 FC ***(dist)***

Legislation referred to:
Companies Act 1965, ss. 236(1)(e), (2)(a), (i), (3)
Companies Act 2016, s. 486(1)(a), (2)
Companies (Winding-Up) Rules 1972, r. 47
Rules of Court 2012, O. 56 r. 1

For the plaintiff - Nor Shahadah Saari; M/s Shukor Baljit & Partners
For the 2nd & 3rd defendants - Yeong Yen Zan; M/s Justin Faye & Partners

Reported by S Barathi

JUDGMENT
(Encls. 27 & 29)

Azlan Sulaiman JC:

Overview

[1] This judgment will cover my decisions on two applications. By the first (encl. 27), the plaintiff applies to strike out the defendants' appeal in encl. 19 on the grounds that the first defendant was wound up at the time the appeal was lodged, and therefore the first defendant had no *locus standi* to lodge that appeal with the second and third defendants ("the plaintiff's application"). By the second (encl. 29), the first defendant seeks an order that the sanction in a letter dated 17 February 2022 issued by Jabatan Insolvensi Malaysia for and on behalf of the official receiver, Malaysia, the first defendant's liquidator, be given retrospective effect so as to validate the first defendant's appeal in the defendants' appeal in encl. 19 ("the first defendant's application").

Salient Factual Background

[2] By this suit filed on 13 December 2019, the plaintiff sought to recover the outstanding amounts under loan facilities it had granted to the first defendant, which the second and third defendants had jointly and severally guaranteed repayment of.

[3] On 9 January 2020, the plaintiff obtained a judgment in default of appearance against all of the defendants for the sums claimed ("the default judgment").

[4] A little over a year later, the defendants jointly applied to set aside the default judgment ("the defendants' joint-application"). The Senior Assistant Registrar dismissed the defendants' joint-application on 15 April 2021 ("the Registrar's decision").

[5] Pursuant to O. 56 r. 1 of the Rules of Court 2012, on 28 April 2021 the defendants jointly appealed to the judge against the Registrar's decision ("the defendants' joint-appeal"). If not for the complication that I will mention shortly, the next proceeding would have been for me to have heard and decided the defendants' joint-appeal.

[6] The complication was that, on 24 January 2022, *ie*, in between the Registrar's decision and the defendants' joint-appeal, the first defendant was ordered wound up on the plaintiff's petition in Kuala Lumpur High Court Winding Up Petition No: WA-28NCC-504-07-2020 ("the winding up order"). In the winding up order, the official receiver was appointed as liquidator of the first defendant ("the liquidator"). The liquidator was not involved in the lodging of the defendants' joint-appeal.

[7] By a letter dated 17 February 2022 ("the liquidator's letter"), on the second defendant's application as a contributory of the first defendant, the liquidator granted a "sanction" to the second defendant to commence and proceed with this action, and to appoint Messrs Justin Faye & Partners to represent the first defendant, subject to the terms and conditions in the liquidator's letter. Those conditions included providing an akujanji penjamin; depositing the sum of RM5,000 with the liquidator; that the liquidator would not be liable or be held liable for any failure, loss or costs imposed by any party or arising from the action; that the penjamin would bear all the costs of bringing and continuing the action; and that a new sanction would have to be obtained for any appeal.

[8] Paragraph 3 of the liquidator's letter stated as follows:

> Sila ambil perhatian bahawa kebenaran penyelesai ("sanksi") ini **berkuat kuasa pada tarikh surat ini dikeluarkan.** (emphasis added)

[9] In para. 11 of his affidavit in support of the first defendant's application (encl. 30), the second defendant said that he provided the akujanji penjamin and provided the RM5,000 deposit/bond to the liquidator.

[10] On 1 March 2022, the plaintiff filed the plaintiff's application, and on 9 March 2022, the first defendant filed the first defendant's application.

A **The Issues**

[11] Based on the parties' affidavits and written submissions filed on the plaintiff's application and the first defendant's application, the issues I will have to decide are:

B (i) whether the first defendant had *locus standi* to appeal against the Registrar's decision;

(ii) whether the sanction issued by the liquidator to the second defendant to proceed into the first defendant's appeal against the Registrar's decision was valid;

C (iii) whether that "sanction" issued by the liquidator should be ordered to have retrospective effect; and

(iv) if the first defendant's appeal against the Registrar's decision is invalid, whether the second and third defendants' appeals *vide* the joint-appeal are also rendered invalid.

D *Issue (1): Whether The First Defendant Had Locus Standi To Appeal Against The Registrar's Decision*

[12] It is established law that, once a company has been wound up, only the appointed liquidator has the power and authority to institute and defend any legal action for the company.

[13] In *Zaitun Marketing Sdn Bhd v. Boustead Eldred Sdn Bhd* [2010] 3 CLJ 785, Gopal Sri Ram JCA said:

> What appears to have been overlooked all round is the fundamental principle that once a limited company is wound up, its assets and liabilities vest in the liquidator. It is up to him to decide whether to institute, continue the prosecution, of or defend legal proceedings. However, there is jurisdiction in the court to authorize other persons to conduct litigation in the name of the company.

G **[14]** In *Small Medium Enterprise Development Bank Malaysia Bhd v. Blackrock Corporation Sdn Bhd & Ors* [2017] 9 CLJ 45, Zabariah Mohd Yusof JCA (as Her Ladyship then was) said:

> The powers to conduct the affairs of the wound up company, including the power to institute legal proceedings is vested in the liquidator ... it is left to the liquidator as to how to proceed with any legal proceedings.

[15] As only the liquidator could have lodged an appeal against the Registrar's decision for and on behalf of the first defendant after it was ordered wound up, I would accordingly hold that the first defendant on its own without the liquidator did not have *locus standi* to appeal against the Registrar's decision at the time the defendants' joint-appeal was lodged.

Issue (2): Whether The Sanction Issued By The Liquidator For The First Defendant To Appeal Against The Registrar's Decision Was Valid

[16] The plaintiff contends that, on the winding up of the first defendant, only the liquidator had the power and authority to lodge the appeal against the Registrar's decision for the first defendant, and that he did not have the power to delegate that power to any other person to lodge that appeal for the first defendant.

[17] The first defendant contends that the liquidator has that power to authorise another person to bring that appeal for the first defendant. However, because that sanction was only issued in the liquidator's letter and was to take effect from the date of the liquidator's letter, *ie*, 17 February 2022, in the first defendant's application, the first defendant prays for the following relief:

(A) that leave *nunc pro tunc* be granted and the sanction be granted by the Official Receiver (in its capacity as the liquidator of the 1st Defendant) on 17.2.2022 to have retrospective effect;

(B) that the Notice of Appeal dated 28.04.2021 lodged by the 1st Defendant be deemed to have been validly filed and lodged;

(C) costs in the cause; and

(D) such other reliefs deemed fit and/or suitable by this Honourable Court.

[18] I note that, in prayer (A) of the first defendant's application, the first defendant only asks for the sanction granted by the liquidator on 17 February 2022 to have retrospective effect, but it does not specify any specific date to which the sanction is to be backdated to. Nevertheless, for the purpose of this judgment and based on prayer (B), I will assume that the first defendant intended to have the sanction backdated to take effect from the date the defendants' joint-appeal was filed, on 28 April 2021.

[19] From the first defendant's application, the first defendant was clearly of the view that, in order to regularise its appeal against the Registrar's decision, it needed to do two things. First, it needed to obtain a sanction from the liquidator to lodge the appeal. Second, because that sanction was to take effect from the date of the liquidator's letter, it needed to apply for and obtain an order from this court for that sanction to have retrospective effect.

[20] I will now examine whether the plaintiff's stand or the first defendant's stand accords with the law.

Section 486(1) And The Twelfth Schedule Of The Act

[21] A liquidator is a creature of statute, and he derives his powers from the statute that creates him and enables him. This means that he only has and can only exercise those powers that the statute expressly gives him.

[22] In Malaysia, the source of a liquidator's powers in a winding up by the court are s. 486(1) and the Twelfth Schedule of the Companies Act 2016 ("the Act").

[23] By s. 486(1)(a), the liquidator may, without the authority of the court or of the committee of inspection exercise any of the general powers in Part I of the Twelfth Schedule.

[24] Part I of the Twelfth Schedule consists of items (a) to (l). Under item (a) of the Twelfth Schedule, a liquidator may "bring or defend any action or other legal proceedings in the name and on behalf of the company."

[25] Under item (j) he may "appoint an agent to do any business which the liquidator is unable to do", and under item (k) he may "appoint an advocate to assist him in his duties."

[26] The language used in respect of those general powers in Part I connote that the liquidator must exercise those powers personally.

[27] Section 486(2) of the Act provides:

> The exercise by the liquidator in a winding up by the Court of the powers conferred by this section is subject to the control of the Court and any creditor or contributory may apply to the Court with respect to any exercise or proposed exercise of any of those powers.

[28] As this analysis will involve referring to cases decided under the Companies Act 1965 ("CA 65"), it may be opportune at this juncture to set out the equivalent provisions thereunder. They are ss. 236(2)(a), 236(2)(i), and 236(3):

> **Section 236(2)(a)**
>
> The liquidator may bring or defend any action or other legal proceeding in the name and on behalf of the company.
>
> **Section 236(2)(i)**
>
> The liquidator may appoint an agent to do any business which the liquidator is unable to do himself.
>
> **Section 236(3)**
>
> The exercise by the liquidator of the powers conferred by this section shall be subject to the control of the Court, and any creditor or contributory may apply to the Court with respect to any exercise or proposed exercise of any of those powers.

[29] As for appointing an advocate to assist him in his duties akin to item (k) of Part I of the Twelfth Schedule to the Act, s. 236(1)(e) of the CA 65 provided that the liquidator could only do that "with the authority either of the court or of the committee of inspection." However, in *Zaitun Marketing*, the Federal Court held that the liquidator can still appoint an advocate to

assist him to bring or defend an action without the authority of the court or the committee of inspection, because he clearly needs the services of an advocate to do so.

Neither the Act Nor CA 65 Provide For A Liquidator's Sanction

[30] Neither the Act nor the CA 65 contain any express provisions giving a liquidator the power to delegate or abrogate the exercise of any of his powers, or the power to issue a sanction to someone else to exercise any of those powers. This necessarily means that Parliament had intended for the liquidator to personally exercise those general powers, including that power to "bring or defend any action or other legal proceedings in the name and on behalf of the company" under item (a) of Part I of the Twelfth Schedule.

[31] This is supported by case authority. In *Kosmopolitan Credit & Leasing Sdn Bhd v. Yeo Heng Heang & Ors* [1999] 1 LNS 103; [1999] 6 MLJ 725, two individuals appointed as receivers and managers of the plaintiff company brought claims for and on behalf of the company against the defendants for an unpaid loan. When the company was subsequently wound up, the appointed liquidator under the winding up order gave them both the power to continue prosecuting those claims for the company. KC Vohrah J said (at p. 728 E-G):

> As for the second question, I am puzzled as to how the liquidator could have appointed Ler Cheng Chye and Lam Tuck Cheong as receivers and manager where did he derive such a power? Ler and Lum ceased to be receivers and managers of the company upon the order of winding up made in respect of the company, and to cite the name of the plaintiff and state '(Dalam Pembekuan) (Penerima dan Pengurus dilantik)' is clearly not correct or relied. The power of instituting any suit is at the discretion of the liquidator (see s. 236(a)) – the power is his and he cannot delegate it.
>
> Although a general provision, s. 236(2)(i) allows a liquidator to appoint an agent to do any business, it is for business which the liquidator is unable to do himself, but that cannot override the specific provision of s. 236(2)(a) giving him power 'to bring or defend any action or other legal proceeding in the name of or on behalf of the company.'

[32] Over ten years earlier in Australia, in *Ah Toy v. Registrar of Companies (NT)* 72 ALR 107, the appellant was appointed the provisional liquidator and then liquidator of Day & Dent Constructions Pty Ltd. However, because of his advanced age, he appointed Price Waterhouse as "my agents for the purposes of such liquidation and for all matters incidental thereto", and played little part in the liquidation process. Justices Toohey, Morling and Wilcox JJ said (at p. 112 of the judgment):

A The Companies Act contains no provision for the delegation of the functions of the provisional liquidator. In relation to liquidators there is a limited provision. Section 236(2)(j) provides that a liquidator "may appoint an agent to do business which the liquidator is unable to do himself". That provision falls well short of authorizing the type of wholesale delegation undertaken in this case.

B The purpose of section 236(2)(j) is to enable delegation of specific tasks which the liquidator, for one reason or another, is not able to undertake. The scheme of the Act is that the liquidator remains generally responsible to the court and to the creditors and contributories of the company for the conduct of the liquidation. We agree with the comments by Marks J C made in relation to a similar general delegation in Harvey at 754, that if a liquidator is so disabled in some way that he cannot perform the duties to which he has been appointed, his duty is not to appoint an agent but to seek leave to resign his office.

[33] *Ah Toy v. Registrar of Companies* was applied in *Goh Siew Koon & Ors* D *v. Lim Jit Kim & Ors* [2015] 1 LNS 1222. In that case, one Lim Aik @ Lim Yeok was appointed as liquidator of Sin Hai Estate Berhad ("*Sin Hai*"). He then appointed PricewaterhouseCoopers Advisory Services Sdn Bhd ("*Pricewaterhouse*") to assist him in "all aspect of the liquidation" of Sin Hai for "professional fee", and paid out over RM1.1m to it. One year into his E appointment, he applied to the court, *inter alia*, to appoint one Lim San Peen of Pricewaterhouse as a joint-liquidator, and to validate all of his previous actions and all payments made to Pricewaterhouse. The majority contributories applied to remove him as liquidator and appoint someone of their choice to replace him. The High Court dismissed their application and F the contributories appealed. In paras. [43] and [46] of its judgement (which sandwiched the reference to *Ah Toy v. Registrar of Companies* in para. [44]), the Court of Appeal said:

It is obvious that the appointment of Pricewaterhouse was not "to appoint an agent to do any business which the liquidator is unable to do himself" within the meaning of section 236(2)(i) of the Companies Act 1965. It was G not merely to assist Mr. LA in his ordinary administrative and management duties that are within his ordinary professional competence: *Wong Sin Fan & Ors* (*supra*). Mr. Lim Aik had in effect abrogated the powers granted to him by the Court, thus rendering his position superfluous and untenable.

H By authorizing Pricewaterhouse to assist in "all aspect of the liquidation", Mr. LA had effectively given Pricewaterhouse *carte blanche* to perform all the work that the Court entrusted him to carry out. This conduct must not be condoned by the Court.

As stated by the Federal Court of Australia in *Ah Toy* (*supra*), provisional I liquidators and liquidators are appointed to their office as individuals and upon the strength of their personal qualifications.

[34] In *University Of Malaya (University Of Malaya Medical Centre) v. FBSM CTECH Sdn Bhd* [2018] 8 CLJ 71, the appellant appointed Technitium Sdn Bhd as its contractor to supply an information system to the University of Malaya Medical Centre, and Technitium appointed the respondent as its subcontractor. The respondent brought an action against the appellant for payments due from the appellant to Technitium, and the appellant applied to strike out the claim. Apart from privity of contract, one of the grounds for striking out was that the respondent had been wound up and the liquidator had given a sanction to one of its creditors to bring the action. Rohana Yusof JCA (as Her Ladyship then was) said:

> There is no law that says a liquidator's powers as contained in section 236 of the Companies' Act 1965 can allow a liquidator to 'sanction' a creditor to take out an action for an on behalf of a wound up company (see s. 236(3) of the Companies Act 1965). in this regard, we found the learned trial judge had failed to appreciate what sanction is, and the ambit of the liquidator's powers under the Companies Act.

And further down in Her Ladyship's judgment:

> The law relating to companies' liquidation does not empower a liquidator to sanction any creditor to sue on behalf of a company in liquidation.

[35] These cases make it quite clear that a liquidator cannot delegate any of his powers, including the power under item (a) of Part I of the Twelfth Schedule to "bring or defend any action or other legal proceedings in the name and on behalf of the company."

The Liquidator's Letter

[36] Looking now to the liquidator's letter, I would hold that he had, in effect and substance, abrogated and delegated his power under item (a) of Part I of the Twelfth Schedule to bring the first defendant's appeal against the Registrar's decision to the second defendant as a contributory of the first defendant. To me, that is evident even from the title to and from paras. 1 and 2 of the OR's letter, which read as follows:

> Dalam Perkara Penggulungan Syarikat No: WA-28NCC-504-07/2020
>
> Ber: Pekan Legasi Sdn Bhd (612996-K) (dalam penggulungan)
>
> Per: Syarat-syarat Bagi Permohonan Kebenaran Penyelesai Di Bawah Akta Syarikat 1965/Akta Syarikat 2016
>
> Dengan hormatnya saya merujuk kepada perkara di atas dan Permohonan Penyumbang bertarikh 08.12.2021 adalah berkaitan.
>
> 2. Berdasarkan Surat Aku Janji tuan/puan bertarikh 08.12.2021, Pegawai Penerima dan Penyelesai ('PPP') bagi syarikat PEKAN LEGASI SDN BHD (612996-K) (dalam penggulungan) telah meluluskan kebenaran penyelesai (sanksi) untuk tuan/puan memulakan dan/atau meneruskan

tindakan di Mahkamah Sesyen di Kuala Lumpur bagi Guaman No: WA-22M-1051-12/2019 dan melantik Tetuan Justin Faye & Partners untuk mewakili syarikat PEKAN LEGASI SDN BHD (612996-K) (dalam penggulungan) dalam guaman tersebut tertakluk kepada syarat-syarat seperti berikut:

[37] Even though the liquidator's letter was addressed to Messrs Justin Faye & Partners, it was clearly intended for the second defendant as contributory. This is because the first paragraph itself – which customarily identifies the subject matter that a letter is responding to – says:

Dengan hormatnya saya merujuk kepada perkara di atas dan permohonan Penyumbang bertarikh 08.12.2021 yang berkaitan.

[38] Thus, despite being addressed to Messrs Justin Faye & Partners, the liquidator's letter was in reality responding to the second defendant's application for "sanction", which the second defendant himself admitted in para. 10 of his affidavit in support of the first defendant's application (encl. 30) that he had made through Messrs Justin Faye & Partners. The use of the pronoun "tuan/puan" in para. 2 of the liquidator's letter indicates it was indeed correspondence from the liquidator to the second defendant (an individual) *via* Messrs Justin Faye & Partners and not to that firm personally.

[39] In my opinion too, the liquidator's letter was clearly not an appointment of the second defendant as his agent under item (j) of Part I of the Twelfth Schedule "to do any business which the liquidator is unable to do". That is evident from the subject-matter of the liquidator's letter – sanction – and from the akujanji penjamin, bon jaminan, and the monetary deposit that the liquidator required of and accepted as security from the second defendant, to insulate itself from any fall out that may result from continuing with that appeal. To borrow words from *Ah Toy* (*supra*) it was a wholesale delegation of that power.

[40] On the taking security from the second defendant, I would also note that the Act does not provide for the liquidator taking any security. The only provision for taking security is in r. 47 of the Companies (Winding-Up) Rules 1972, which allows the official receiver to direct a private liquidator to provide security. That is not the case here.

[41] As for appointing Messrs Justin Faye & Partners, in para. 12 of his affidavit in support of the first defendant's application (encl. 30), the second defendant contended that the said solicitors were appointed by the liquidator to represent the first defendant and to start and proceed with this action, akin to the exercise of his powers under item (k) of Part I of the Twelfth Schedule. I do not agree.

[42] If the liquidator's letter was the liquidator's appointment of Messrs Justin Faye & Partners, then it would have said so, and omitted any mention of "permohonan kebenaran penyelesai" in the title or in para. 2 of the liquidator's letter.

[43] In my view, the "kebenaran penyelesai" in the liquidator's letter was therefore two-fold; to give sanction to the second defendant to continue with the first defendant's appeal (subject to conditions), and for him to appoint Messrs Justin Faye & Partners for that purpose.

[44] Even though item (k) of the Twelfth Schedule of the Act allows a liquidator to "appoint an advocate to assist him in his duties", in my view it would not extend to appointing an advocate to assist a contributory to carry out a liquidator's duties.

The Court's Power Of Sanction Under The Act

[45] I am also of the view that the Act does provide for giving a sanction to a creditor or contributory – and only a creditor and contributory – to bring an action on behalf of a wound up company. However, that power to issue such sanction is only exercisable by the court. The basis for this is s. 486(2) of the Act and *Zaitun Marketing*.

[46] As I pointed out earlier, s. 486(2) of the Act provides:

> The exercise by the liquidator in a winding up by the Court of the powers conferred by this section is subject to the control of the Court and any creditor or contributory may apply to the Court with respect to any exercise or proposed exercise of any of those powers.

[47] In paras. [17] and [18] of *Zaitun Marketing*, Gopal Sri Ram FCJ said:

> What appears to have been overlooked allround is the fundamental principle that once a limited company is wound up, its assets and liabilities vest in the liquidator. It is up to him to decide whether to institute, continue the prosecution of or defend legal proceedings. However, there is jurisdiction **in the court** to authorize other persons to conduct litigation in the name of the company. (emphasis added)
>
> In *Russel v. Westpac Banking* 13 ACSR 5, King CJ when delivering the judgment of the Full Court of South Australia said:
>
> When the company is in liquidation, the person in whom is vested the authority to institute proceedings, is the liquidator: *Scarel Pty Ltd v. City Loan & Credit Corporation Pty Ltd* [1988] 12 ACLR 730. There is power, however, **in the court** to authorize other persons to conduct litigation in the name of the company. (emphasis added)

[48] Thus, it is within the ambit of control over the exercise by the liquidator of his powers that the court may empower someone else other than the liquidator to bring an action for and on behalf of the company.

[49] As to why that court sanction can only be given to creditors and contributories, in the latter part of para. [19] of *Zaitun Marketing*, Gopal Sri Ram FCJ referred to *Cape Breton Company v. Fenn* [1881] 17 Ch D 198 in which Cotton LJ said:

> But who are the persons who can be authorized to take these steps? In my opinion the creditors and contributories only, not under any special clause of the Act, but because they are the persons who, under the terms of the Act, can intervene if they are advised that the liquidator does not properly do his duty.

[50] As to the circumstances in which the court will authorise those persons to conduct litigation in the name of the company, Gopal Sri Ram FCJ (as he then was) said in the first sentence of para. [19]:

> Of course, resort to the court's powers to authorize someone other than the liquidator to institute, continue or defend proceedings only arises where the liquidator refuses to do so and declines authority.

[51] *Cape Breton Company v. Fenn* that Gopal Sri Ram FCJ referred to also mentioned three other instances where the court may authorise them to conduct litigation in the name of the company. These were where the liquidator does not bring an action, where he is advised not to, and where he has no funds to.

[52] The court's power to issue a sanction to a creditor or contributory to bring an action for and on behalf of a wound up company is also supported by other case authorities.

[53] The Court of Appeal in *Hup Lee Coachbuilders Holdings Sdn Bhd v. Cycle & Carriage Bintang Bhd* [2012] 10 CLJ 88 referred to *Zaitun Marketing*. In para. [15] of the judgment, Ramly Ali JCA:

> Section 236(2) of the Companies Act 1965 strengthens the position that only the official assignee as the appointed liquidator has the power to bring or defend any action or other legal proceedings in the name and on behalf of the wound up company, if for whatever reason, the official assignee as the liquidator is unwilling to initiate the action in the name of the wound up company, **a creditor or a contributory can apply to the court** under ss. 236(3) or 279 of the Companies Act 1965 seeking an order that the liquidator be compelled to initiate the action in the name of the wound up company or that leave be given to the creditor or contributory himself to bring the action in the name of the company. (See *Abric Project Management Sdn Bhd v. Palmshine Plaza Sdn Bhd & Anor* [2007] 7 CLJ 516; *Zaitun Marketing Sdn Bhd v. Boustead Eldred Sdn Bhd* (*supra*)). Again, to do so, the creditor or the contributory must have obtained **leave of the court** before commencing the action in the name and on behalf of the wound up company. (emphasis added)

[54] That was also the line taken by the Federal Court about one month later, in *Ooi Woon Chee & Anor v. Dato' See Teow Chuan & Ors And Other Appeals* [2012] 2 CLJ 501; [2012] 2 MLJ 713, though in somewhat different circumstances. In that case two individuals were appointed as liquidators of Kian Joo Holdings Sdn Bhd ("KJH"). The major contributories of KJH took exception to the manner in which they sought to dispose of shares in one of KJH's subsidiary companies, and filed an application in their own names for leave to proceed with legal proceedings for misconduct against them. In para. [14] of the judgment, Zulkefli CJ (Malaya) said that the contributories had no cause of action:

> In any event we find that there is no cause of action in the majority contributories. The complaint was that the sale of the company's shares was improperly conducted and accordingly, any loss suffered is in fact suffered by the company. The proper plaintiff is the company and although the liquidators control the company, the majority contributories may obtain an order from the winding up court allowing conduct of the action (see the case of *Zaitun Marketing Sdn Bhd v. Boustead Eldred Sdn Bhd (formerly known as Boustead Trading (1985) Sdn Bhd* [2010 3 CLJ 785 (FC).

[55] In *Winstech Engineering Sdn Bhd v. ESPL (M) Sdn Bhd* [2014] 2 CLJ 1, the Federal Court said the court could even issue that sanction retrospectively, *nunc pro tunc*:

> Following *Saunders*' case, we hold the view that in appropriate circumstances, which has to be proven, leave *nunc pro tunc* may be given under s. 236(2)(a) of the Companies Act **subject to the discretion of the courts** under s. 236(3) of the Act. Such **discretion and control by the court** under s. 236(3) is to be read together with s. 226(3) of the Act. This is notwithstanding the fact that proceedings had already commenced.
>
> (emphasis added)

[56] In *Small Medium Enterprise* (*supra*), the suit was filed by the directors of the wound up company. Zabariah Mohd Yusof JCA (as Her Ladyship then was) said:

> In our present case (suit 207), the official receiver should have come in to institute the action on behalf of the first plaintiff. None of the parties obtained **leave from the court** for the contributories to institute the action in court. In the event the liquidator refused, then they could get a court order. (emphasis added)

[57] Thus, under the Act, the scheme for a wound up company bringing, continuing with or defending an action is very straightforward and simple. Firstly, only the liquidator has the power to do so. It is only when he refuses to, or is unable to, or is advised not to, or has no funds to (and I stress that those grounds are not exhaustive), can a creditor or contributory apply to the winding up court for one of two orders: either to compel the liquidator to bring, continue with or defend that action, or alternatively for an order that

they be given the sanction by the court to bring, continue with or defend that action. In their application, they would have to satisfy the court that doing so would be in the interests of the company. And, in giving that sanction, the court can impose terms and conditions, including requiring security and indemnity. But the liquidator does not have that power.

[58] In my view, that scheme is both rational and logical. Firstly, s. 486(2) of the Act makes the exercise of the liquidator's powers subject to the control of the court. This means that there is legislative basis for the court having that power of sanction.

[59] Secondly, only the court is best placed to make that judicial evaluation of whether bringing, continuing with or defending that action would be in the interests of the company, particularly where the liquidator has first declined to. The court would naturally want to and be entitled to request the presence of the liquidator to hear his views and why he decided not to pursue it himself.

[60] Thirdly, if a liquidator from the Jabatan Insolvensi Malaysia is allowed to give a sanction to someone else to bring an action, why could not the same power be given to and exercised by a private liquidator? Though the Act does give certain powers to the official receiver over a private liquidator and other functions and duties that a private liquidator does not enjoy, it does not make a distinction between the powers of a liquidator from Jabatan Insolvensi Malaysia and the private liquidator when they wear the liquidator's hat. Section 486 and the Twelfth Schedule of the Act apply equally to all liquidators, public or private. Allowing a private liquidator similar *carte blanche* power to delegate his duties may lead to misuse and abuse.

[61] Fourthly, as the court's power to sanction a creditor or contributory to bring, continue with or defend and action is derived from s. 486(2) of the Act by which it controls the exercise of the powers by the liquidator, then a liquidator is surely in a subservient position to the court and cannot be placed on par with the court in having that power.

Applying The Law To This Case

[62] As that power to lodge and continue with the first defendant's appeal against the Registrar's decision was given solely to the liquidator under s. 486 and item (a) of the Twelfth Schedule of the Act, and as there are no provisions in the Act for him to delegate that power, I would hold that the "sanction" which the liquidator purported to issue to the second defendant to do so was not valid. I would concur with the plaintiff's stand.

[63] Nor was I in a position to treat the first defendant's application as an application under s. 486(2) of the Act. As I have already stated above, such an application is predicated on the liquidator first refusing, being unable to,

being advised not to or not having the funds to lodge that appeal for the first defendant. That was not the case here; the liquidator had simply delegated his power to appeal to the second defendant.

[64] It follows that the first defendant had not obtained a valid sanction to appeal against the Registrar's decision.

[65] I have not overlooked that, in the second and third sentences of para. [19] of *Zaitun Marketing*, Gopal Sri Ram FCJ (as he then was) said that the liquidator does have that power to issue a sanction:

> But where, as here, the liquidator grants authorization, there is no necessity to move the court. Once authority has been given either by the liquidator or the by the court, the person authorized may appoint counsel of his or her choice to prosecute the proceedings in question.

[66] However, with all humility and respect, based on the above which points to there being no liquidator's "sanction" under the Act, I am unable to agree with that position. They are incompatible with the principle that a liquidator only has those powers that the Act expressly gives him.

[67] Gopal Sri Ram FCJ's statements in para. [19] of the judgment actually flowed on from para. [14] of the judgment in which he said, *inter alia*:

> The real issue at the heart of this appeal is whether sanction may be granted by the Director General of Insolvency ("the DGI" for short) to a former director of a company in liquidation who is also not a contributory or creditor to use the name of the company to bring, continue or defend an action.

[68] The two cases which he then referred to, namely *Russel v. Westpac Banking* 13 ACSR 5 and *Cape Breton Company v.. Fenn* actually spoke of the court's power to authorise other persons to bring an action, and did not even suggest that the liquidator had that power.

[69] Further, Rohana Yusof JCA (as Her Ladyship then was) in the *UMMC* case (*supra*) pointed out that, in *Zaitun Marketing*, the sole question on which leave to appeal to the Federal Court had been granted was whether the official receiver/liquidator can appoint an advocate and solicitor to bring an action or to defend an action solely by relying on s. 236(2)(a) of the Companies Act 1965 independently of s. 236(1)(e). Both Zaki Tun Azmi CJ and Gopal Sri Ram FCJ, who delivered the judgments of the Federal Court, held that he can (see paras. [10] and the last part of para. [21] of the judgment).

[70] Thus, the question as to whether or not a liquidator could issue a sanction to another person to bring an action for and on behalf of a wound up company was not directly before the Federal Court in *Zaitun Marketing*.

[71] As for the other cases which have referred or alluded to a liquidator's sanction, I would again, with all humility and respect, distinguish them, on the basis that in none of them was it ever raised whether a liquidator had that power of sanction in the first place. None of the parties in any of those cases canvassed that issue. They acted on the assumption that a liquidator did have that power of sanction.

[72] For example, the *Merais* case *(Merais Sdn Bhd v. Lai King Lung & Anor* [2019] 7 CLJ 1 (CA) and *Lai King Lung & Anor v. Merais Sdn Bhd* [2020] 9 CLJ 449; [2020] 5 MLJ 614 (FC)). There, the company was wound up in between the filing of the suit and the trial, and the official receiver was appointed liquidator. He then granted a sanction to a contributory to continue with the suit. When the suit was dismissed, an appeal was lodged on the contributory's instructions, who simultaneously applied to the official receiver for his sanction to file and prosecute the appeal. That sanction came 42 days later.

[73] From the facts of that case, the conduct of both parties evidenced their shared belief that the official receiver did have the power to issue a sanction to the contributory to continue the suit at first instance and to lodge an appeal. They had continued with the suit to its conclusion after getting the liquidator's sanction, and immediately after receiving the notice of appeal, the respondent's solicitors wrote to the appellant's solicitors seeking the assurance that "you would have obtained the required sanction from the official receiver to advance the intended appeal." The respondent then applied to strike out the appeal on the ground that the appellant did not have that sanction when the appeal was lodged.

[74] Thus, the main issue before both the Court of Appeal and the Federal Court in *Merais* was whether the official receiver had the power to grant a sanction that would have retrospective effect. The Court of Appeal held that he had and the Federal Court held otherwise. It was never raised or in issue before either court whether the official receiver actually had the power to issue a sanction, and thus it was not an issue to be decided by either court.

Issue (3): Whether The "Sanction" Issued By The Liquidator Should Be Ordered To Have Retrospective Effect

[75] Even though I have already held that there is no liquidator's "sanction" under the Act, I will still address this issue on the assumption that the official receiver does have the power to issue such a sanction.

[76] I would still nevertheless hold that the "sanction" issue by the liquidator on 17 February 2022 in the liquidator's letter should not be ordered to have retrospective effect.

[77] Firstly, the liquidator has himself stated in para. 3 of the liquidator's letter that: A

> Sila ambil perhatian bahawa kebenaran penyelesai ("sanksi") ini **berkuat kuasa pada tarikh surat ini dikeluarkan.** (emphasis added)

[78] This is in line with the decision of the Federal Court in *Lai King Lung* (*supra*) that the official receiver as liquidator does not have the power to issue a retrospective sanction. B

[79] Thus, it does not lie for this court to override the discretion and decision of the liquidator without any good reason shown. The first defendant's application was certainly not an application under s. 486(2) of the Act by the second defendant as contributory to review the exercise or the proposed exercise by the liquidator of his powers. C

[80] Secondly, even though the courts have the power to grant leave with retrospective effect *ie*, leave *nunc pro tunc*, it is still only in appropriate circumstances which must be proven, and in rare circumstances. D

[81] In *Winstech Engineering* (*supra*), Mohamed Apandi Ali FCJ said:

> Following *Saunder*'s case, we hold the view that in appropriate circumstances, which has to be proven, leave *nunc pro tunc* may be given under s. 236(2)(a) of the Companies Act subject to the discretion of the courts under s. 236(3) of the Act. Such discretion and control by the court under s. 236(3) of the Act is to be read with s. 236(3) of the Act This is notwithstanding the fact that proceedings had already been commenced. E

[82] In *Small Medium Enterprise Development Bank Malaysia Bhd* (*supra*), Zabariah Yusof JCA (as Her Ladyship then was) echoed what Mohamed Apandi Ali FCJ said in the *Winstech* case and then added: F

> That would only happen in very rare circumstances
>
> Thus, it is not as a matter of right that sanction is to have retrospective effect. Even in Winstech, at the end of it, leave *nunc pro tunc* was not granted as there was no material for the court to grant such leave to the applicant. G

[83] In this case, the only document the second defendant adduced is the liquidator's letter. Though he did allege in para. 10 of his affidavit (encl. 30) that "concurrently with the filing of the said notice of appeal, I had, through my solicitors, liaised with the official receiver to obtain sanction to proceed with the first defendant's appeal in light of the winding up order", he did not adduce any documents or evidence to back that up. It was a bare allegation. H

[84] To the contrary, the liquidator's letter clearly refers to a "permohonan penyumbang bertarikh 8 December 2021 yang berkaitan". This indicates that the second defendant had only applied for the liquidator's sanction on 8 December 2021, more than seven months after the defendant's joint-appeal I

was lodged. In the absence of any other documents related to his application to the liquidator, that it is only conclusion I can make. I would also note that the second defendant has not deposed to any reasons or explanation for this time lapse or delay.

[85] I would also note from the winding up order that the second defendant had deposed two affidavits for the first defendant in opposing the winding up petition. The first defendant was represented by solicitors in the winding up proceedings and obviously receiving instructions from the second defendant. This means that the second defendant was personally involved in both the defendant's joint-application to set aside the judgment and in the winding up proceedings, which were proceeding at the same time. So, he would have known of the winding up order against the first defendant and of the appointment of the liquidator. Yet, he provides no explanation for not applying for sanction contemporaneously with the filing of the defendants' joint-appeal.

[86] The first defendant's reliance on the decision of the Federal Court in *Lai King Lung* (*supra*) and the decision of the Court of Appeal in *Reebok (M) Sdn Bhd v. CIMB Bank Bhd* [2019] 9 CLJ 230 is of no assistance. In both cases, the contributory applied to the liquidator for sanction concurrently with the appeal that was lodged. Here, there was an unexplained gap of over seven months between the defendants' joint-appeal and the application to the liquidator for sanction.

[87] I would accordingly reject the first defendant's application for leave *nunc pro tunc* and for the "sanction" issued by the liquidator on 17 February 2022 to be given retrospective effect.

Issue (4) Whether The Invalidity Of The First Defendant's Appeal Vitiates The Defendants' Joint-Appeal

[88] The only reason why this issue arises is that, in the plaintiff's application, the plaintiff is applying for an order that "notis rayuan bertarikh 28 April 2021 dibatalkan." As the said notis rayuan was filed jointly by all three defendants, the plaintiff is therefore seeking an order that the second and third defendants' appeal against the Registrar's decision also be struck out, on the basis that the first defendant's part in that appeal is invalid.

[89] I do not agree. Apart from the fact that the plaintiff has not included in its written submission any submissions submitted on the issue as to whether the whole of the notis rayuan – including the second and third defendants' appeal against the Registrar's decision – is also vitiated by the invalidity of the first defendant's appeal, I would also hold that there are no reasons why the second and third defendants' appeal should be so affected. Tainting them with the first defendant's invalid appeal would be unjust.

Conclusion

[90] In conclusion, the first defendant's appeal against the Registrar's decision is invalid.

[91] I would accordingly make the following orders:

(i) I dismiss the first defendant's application in encl. 29, with costs;

(ii) I allow the plaintiff's application in encl. 27, only to the extent of striking out the first defendant's appeal against the Registrar's decision, with costs; and

(iii) as the second defendant is the actual person moving the first defendant's application in encl. 29, I order the second defendant to pay costs of RM5,000 subject to allocator, to the plaintiff, for both the first defendant's application in encl. 29 and the plaintiff's application in encl. 27.

[92] Moving forward, I will proceed to issue directions for the hearing of the second and third defendants' appeal against the Registrar's decision.